

No. 97-115

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1996

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,

Petitioners,

vs.

PAUL W. GEIGER,

Respondent.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit*

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Dr. Paul Geiger, the Respondent/Debtor, ("Dr. Geiger") served as Margaret Kawaaauhau's physician for approximately five years from 1977 until 1983 (Mrs. Kawaaauhau hereinafter referred to as "Petitioner," both individually and collectively with her husband, Solomon Kawaaauhau). During that time he treated her for a variety of ailments, including diabetes, obesity, hypertension, chronic pulmonary disease and congenitive heart failure. Prior to the injury in question, the Petitioner had been hospitalized on 18 other occasions resulting in overwhelming medical expenses. During the course of various treatments by Dr. Geiger, the Petitioner continually expressed her concern about the costs of medical care and medications prescribed because she was unable to obtain any medical assistance to pay her mounting medical bills.

During the incident from which this appeal stems, Dr. Geiger's ability to treat the Petitioner was limited by her demands to keep the costs to a minimum. At all times Dr. Geiger believed that the course of treatment he meticulously administered to the Petitioner would heal her infection. In fact, the evidence shows that the test ordered by Dr. Geiger indicated his treatment was initially effective in combating the infection. Dr. Geiger admitted that he knew penicillin was a more effective antibiotic, but prescribed tetracycline due to the financial constraints placed on him by the Petitioner. Despite Dr. Geiger's efforts, the Petitioner's leg had to be amputated below the knee. Dr. Geiger did not intend to harm the Petitioner which was admitted by the Petitioner.

Petitioner filed a malpractice suit against Dr. Geiger and obtained a judgment. On March 16, 1989, Dr. Geiger filed a Petition for Relief pursuant to Chapter 7 of the Bankruptcy Code. Petitioner filed a Complaint in the United States Bankruptcy

Court seeking to except the debt from discharge pursuant to 11 U.S.C. § 523(a)(6). Trial was held on the merits of the Complaint in the Bankruptcy Court on September 6, 1990. Petitioner's sole source of evidence at trial was transcripts from the state court trial and the deposition of their expert, Dr. Peter Halford. No witnesses were presented by the Petitioner. Dr. Geiger testified in his defense at the trial. The Bankruptcy Court excepted the malpractice judgment from discharge pursuant to 11 U.S.C. § 523(a)(6). *In re Geiger*, 172 B.R. 916 (Bankr. E.D. Mo. 1994). The Bankruptcy Court, based on a review of the deposition of Dr. Halford, concluded that "Dr. Geiger's treatment of Mrs. Kawauhau was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." (App. A-13).¹

In affirming the decision of the Bankruptcy Court, the District Court stated that Dr. Geiger's admission that he knew he was providing Mrs. Kawauhau with substandard care when he prescribed oral penicillin rendered his conduct willful. (App. 22). In addition, the District Court determined that his conduct was certain or substantially certain to cause physical harm rendering it malicious within the meaning of the relevant provisions of the bankruptcy code. (App. 22).

Respondent appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit. The Appellate Panel unanimously reversed the decision of the District Court. *In re Geiger*, 93 F.3d 443 (8th Cir. 1996). The Appellate Panel noted that the worst that might even colorably be said of Dr. Geiger's behavior was that he was reckless, and that since there was no evidence that he intended to harm his patient, it was not possible to say that his actions were either willful or malicious, much less both. (App. 25).

1. App. — Referenced are to the Appendix filed by the Petitioner.

Petitioner filed a Petition for Rehearing En Banc before the Eighth Circuit Court of Appeals which was granted. After a thorough review of the legislative history, the Circuit Court reversed the District Court. (App. 37). The Circuit Court stated that

since it is not even alleged that Dr. Geiger intended to inflict an injury on his patient, and it cannot be said that he believed that an injury was substantially certain to result, the judgment underlying the case could not have given rise to a "debt . . . for willful and malicious injury by the Debtor," see 11 U.S.C. § 523(a)(6)

(App. 37). Due to the fact that the Circuit Court found that no intentional tort had been committed, it concluded there was no willful conduct. (App. 36). The Circuit Court indicated that in light of its finding that there was no willful conduct, it was not necessary to decide the meaning of the word malicious where 11 U.S.C. § 523(a)(6) requires that the injury be both "willful and malicious" before a debt is excepted from discharge. (App. 37).

The Petitioner has filed a Writ of Certiorari with this Court to review the decision of the Eighth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

The Petitioner bases their petition on an alleged conflict among the circuits on the definition of the terms "willful and malicious" found under 11 U.S.C. § 523(a)(6). The two medical malpractice cases cited by the Petitioner are factually distinguishable from the present case. Therefore, the cases do not result in a "conflict" among the circuits. The remaining cases

cited by the Petitioner are also factually distinguishable in that they do not involve the discharge of debts resulting from medical malpractice.

The Tenth Circuit case, *In re Franklin*, 726 F.2d 606 (10th Cir. 1984), cited by the Petitioner involved a doctor who committed medical malpractice by failing to take a patient history before he prescribed anesthesia. The doctor then tried to cover up the records and hide his error. Unlike the doctor in *Franklin*, Dr. Geiger did not cover up the records, nor did Dr. Geiger hide his method of treatment of the Petitioner.

The Sixth Circuit case, *In re Perkins*, 817 F.2d 392 (6th Cir. 1987), cited by the Petitioner was based on the *Franklin* decision. In *Perkins*, the doctor unnecessarily injected Mrs. Perkins' left foot with an unsterile needle, failed to perform timely tests when resultant infection was apparent, and then ignored test results that identified the offending bacteria and the appropriate drugs needed to treat the patient. Unlike Dr. Geiger, who constantly monitored his patient and her test results, which lead him to believe his treatment would improve the patient's health, the doctor in *Perkins* completely ignored his patient.

In both *Franklin* and *Perkins*, malice could be implied from the physicians' actions to cover up their mistakes and indifference towards their patients. The concurring opinion in *Perkins* noted that the appalling conduct of the doctor was *not* a willful and malicious injury under § 523(a)(6), but rather reckless conduct which is dischargeable according to legislative history. Nevertheless, the concurring opinion implied that uniformity with the *Franklin* decision was more important than the proper interpretation of the statute. *In re Perkins*, 817 F.2d 395. Therefore, the *Perkins* decision was based on the *Franklin* case which found an intentional injury as a result of covering up the records.

The remaining cases cited by Petitioner were not medical malpractice discharge cases. While it is true the Circuit Court decisions cited by Petitioner involved different interpretations of 11 U.S.C. § 523(a)(6), the cases are entirely factually distinguishable.

The Eighth Circuit Panel *en banc* in the case at bar thoroughly reviewed the legislative history of § 523(a)(6). The Eighth Circuit also analyzed numerous opinions from other Circuit Courts, as well as this Court, in reaching its decision. The Eighth Circuit decision is consistent with the legislative history which specifically overruled a "reckless disregard standard" in deciding what debts were not dischargeable. (App. 32).² Finally, the Eighth Circuit interpretation of § 523(a)(6) supports the fresh start policy on which the Bankruptcy Code is based.

2. The Eighth Circuit decision is further supported by the enactment of 11 U.S.C. § 523(a)(9) which carved out an exception to discharge for injuries caused by operation of a vehicle while under the influence of alcohol, a drug, or another substance. Previously, such acts were dischargeable under 11 U.S.C. § 523(a)(6). It is important to note that Congress created an entire new subsection to address this type of reckless conduct rather than amend § 523(a)(6).

CONCLUSION

No other circuit is in conflict with the specific issue of medical malpractice where there is no additional wrongdoing on the part of the doctor. In the *Franklin* and *Perkins* cases, relied upon by the Petitioner, the court transferred the doctor's intent to deceive the patient to show the doctor intended to cause injury to the patient. Dr. Geiger did not intend to harm or deceive the Petitioner.

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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